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NO. 88-1644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LDB CORPORATION,
Petitioner,

v.

GIBRALTAR SAVINGS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

RESPONSE TO PETITIONER'S STATEMENT OF THE QUESTION PRESENTED

Believing the Petitioner's statement of the question presented is inaccurate, Respondent states the question as follows:

Whether the Court of Appeals' affirmance of the judgment based on fraud and tortious interference violates the Seventh Amendment right to trial by jury where (i) the jury in this diversity case was properly instructed on the elements of "false statement" and "false promise" under Texas law; (ii) the Petitioner (Defendant in the district court) did not object to the instructions and did not challenge them on appeal; (iii) the evidence was overwhelming in support of the contention of Respondent (Plaintiff in the district court) that, in the context of the dealings between the parties, the Respondent's representations were false, material, and Respondent relied upon them to its detriment; and (iv) the error in the jury's award of damages was corrected by the Court of Appeals in its order of remand directing the district court to enter judgment for Respondent's proved loss, increased by interest allowed under Texas law and reduced by any credits actually received by Respondent from certain other parties, the effect being to render harmless the jury's error in awarding a greater sum of damages.

PARTIES TO THE PROCEEDING

The Petitioner, LDB Corporation (sometimes referred to in this brief as "LDB"), was formerly known as LD Brinkman Corporation, a corporation chartered and existing under the laws of the State of Texas. Lloyd D. Brinkman ("Brinkman") is LDB's chairman and chief executive officer.

Gibraltar Savings, a California corporation ("Gibraltar"), is a savings and loan association, chartered and existing under the laws of the State of California.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gibraltar Savings replies to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and reversing in part the decision of the United States District Court for the Western District of Texas in this cause and remanding the case to the district court for further proceedings.

STATEMENT OF THE CASE

An understanding of why there is no error presented in this case—much less one of constitutional dimensions

as required under S. Ct. R. 17.1(a)—begins with understanding the facts which brought Respondent to court in the first place and sufficiently impressed the jury to find in Gibraltar's favor on two counts of fraud and one of tortious interference with contract. These facts are set forth in considerable detail in the opinion of the Court of Appeals. (App. 19a-65a). One fact, however, is central: Gibraltar made a loan to a wholly owned subsidiary of the Petitioner based on the fraudulent representations of the latter's chief financial officer. Gibraltar's loan officer never even met the officers of the borrower or guarantor, much less negotiated with them over any terms of the loan. Gibraltar has never been repaid because of Petitioner's dominance over its former (and now bankrupt) subsidiaries, and the result is the same whether measured on an "out-of-pocket" theory or the "benefit of the bargain" rationale. With those facts prominently displayed, it is a simple matter to understand why the jury found as it did and the district court and the Court of Appeals upheld that verdict. The irony in this case is that under the guise of upholding the Seventh Amendment, it is Petitioner who would have this Court depart from the provisions of that Amendment by re-examining the facts as found by the jury to reach a result expressly contrary to those findings.

On page 5 of its Petition, LDB emphasizes a portion of the Court of Appeals' opinion to bolster its claim the Court of Appeals improperly drew on evidence pertaining to a court-rejected special interrogatory to sustain the fraud finding on which the judgment ultimately was upheld. LDB omits from its quotation the beginning of that paragraph in which the appeals court observed:

> "The jury was properly instructed on the elements required of both the 'false statement' and 'false promise' strands of Texas law. *Indeed, the Defendants did not object to, and do not now challenge, the jury instructions on this issue.*"

App. 53a (emphasis added). LDB also selectively ignores much of the Fifth Circuit's exposition of the evidence (App. 54a-56a) in rejecting Petitioner's legal contention that the " 'ongoing and successful' statements were merely expressions of opinion and not promises as to existing facts required to impose liability for fraudulent inducement to contract." App. 57a. The Fifth Circuit further observed:

> "That Ratcliffe [Petitioner's chief financial officer] 'promised' continued financial backing by the holding company [Petitioner] is as apt a characterization of the questioned remarks as that they were, and were intended to be, personal opinions about future profitability and fiscal health. The materiality of such financing is undisputed, and that Gibraltar made inquiries of this nature and expressed concern over the holding company's intentions was testified to by both Hollingsworth [Gilbraltar's vice president] and Farlow [Gibraltar's loan officer]. Inferences reasonably drawn from these facts lead us to conclude that—in context—Ratcliffe's representations were not merely non-actionable statements of opinion." [Citation omitted.]

App. 57a. As the Fifth Circuit appropriately noted, in the context of this case, the representation concerning the "ongoing" nature of the subsidiary was hardly an "ambiguous expression of opinion" as suggested by Petitioner. App. 56a.

Petitioner correctly notes that the Court of Appeals found as an independent ground to sustain the judgment (as reformed) the jury's finding that LDB had wrongfully interfered with Gibraltar's loan contract with the subsidiary, although the jury found no separate damages. The trial court harmonized the apparent inconsistency of the "no damage" finding on the tortious interference issue with the remainder of the verdict in which fraud and actual damages were found. Again, by selectively emphasizing statements drawn from the opinion of the Court of Appeals, Petitioner infers that the appellate court misconstrued the jury verdict. LDB quotes out of context (Petition, p. 7 n.6) the Fifth Circuit's statement concerning the amount of the judgment. From the surrounding text and the opinion as a whole, it is obvious that the Fifth Circuit was fully aware that the jury verdict was for $6.0 million and not $5.0 million. However, what the court was expressing was its finding that only the $5.0 million component of the verdict was justified by the evidence.

In a similar vein, Petitioner erroneously tells this Court that the Fifth Circuit "rejected the out-of-pocket theory on which the jury had been instructed with reference to the fraud claim." (Petition, p. 6). In fact, what the appeals court rejected was LDB's theory that Gibraltar had the affirmative burden to *dis*prove LDB's fanciful assertion that the guaranties were worth the equivalent of the loan and therefore were "security" for the loan. Finding that the straight loan of money does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws, the Fifth Circuit rejected LDB's effort to shift from itself the burden of proof on what is essentially an affirmative defense. App. 62a.

In the argument which follows, Respondent will demonstrate why the Court of Appeals was correct in affirming the jury verdict and that now to disturb that judgment (as reformed and reduced by the appeals court) would contravene the very injunction of the Seventh Amendment to preserve inviolate the right to trial by jury.

REASONS FOR DENYING THE WRIT

To keep a sense of perspective in reviewing this case, it would be well to begin with Petitioner's conclusion that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 17.1(a). In reaching this conclusion, Petitioner claims not only did the Court of Appeals commit fundamental error, but predicts the most dire consequences to the right of trial by jury. Its premise is unwarranted; its prediction is absurd. In upholding the district court judgment, the Court of Appeals did no more than sustain the result which the jury intended and which is fully supported by the evidence.

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT BASED ON THE JURY VERDICT OF FRAUD.

The linchpin of Petitioner's argument (and its fatal flaw) is contained in a statement on page 10 of its Petition: "The present case involves action not by the trial judge, but by the Court of Appeals on review of a jury's verdict." The Court of Appeals *affirmed* the trial court judgment. Had the Court of Appeals *reversed* the judgment, Petitioner's argument that the Court of Appeals

"reexamined" the verdict contrary to the rules of the common law and thus, violated the Seventh Amendment, would make more sense. But in this factual setting, the argument is a *non sequitur*.

To illustrate this gap in the logic of Petitioner's reasoning, the Court may look to Fed. R. App. P. 47, and in particular, the Fifth Circuit's local rule 47.6, *"Affirmance Without Opinion,"* which provides in part:

> "When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: . . . (2) That the evidence in support of a jury verdict is not insufficient . . . and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

Suppose in this case, the Fifth Circuit had, under the provisions of its local rule 47.6, entered its order as: "AFFIRMED. *See* Loc. R. 47.6."[1] In that event, Petitioner's counsel would have to be mind readers to know that the appellate court took the tortuous path on which Petitioner now claims the Court traveled to reach its ruling. Yet, the effect is precisely the same because the reviewing court would implicitly have found sufficient evidence to sustain the jury verdict and no error of law in the judgment.

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1. This procedure has repeatedly been upheld by the Fifth Circuit itself. *See*, e.g. *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045 (5th Cir. 1974). The procedure is at least implicitly condoned by this Court. *See, F.C.C. v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275, 69 S. Ct. 1097, 1103, 93 L.Ed. 1353 (1949).

Had the Fifth Circuit affirmed without expressing its rationale, Petitioner would be left with no basis to argue its sole point before this Court that the Court of Appeals *reasoning* is at variance with that employed by the district judge to reach precisely the same result. As Petitioner does not appear to question the sufficiency of the evidence (*see,* Petition, p. 18), its entire complaint is founded on the premise that the Fifth Circuit's logic was flawed in reaching a correct result.

Assuming *arguendo* the validity of Petitioner's assertion, i.e. the Court of Appeals reached its judgment through improper reasoning, the logical extension of this theory would have the Supreme Court obliged to scrutinize with microscopic perfection, every opinion of the lower courts to ensure that not only are their judgments correct, but also every statement of the law precisely correct, regardless of how inconsequential the point to the judgment at hand or the general body of jurisprudence as well. Obviously, such a result is neither desirable nor possible. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955); *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963). Hence, in the context of this case, it surely does no violence to the Seventh Amendment for the Fifth Circuit to have *upheld* the jury verdict and, in substance, the judgment which resulted from it.

Approaching Petitioner's premise from another direction, the flaws in its reasoning are equally apparent. Fed. R. Civ. P. 49(a) allows the use of the special verdict at the discretion of the trial court. *Chemetron Corp. v. Business Funds, Inc.,* 682 F.2d 1149, 1171 (5th Cir. 1982). In the Fifth Circuit, the use of the Rule 49(a)

verdict is especially encouraged. *See,* Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 338, 344 (1967). However, the trial court also has discretion over the nature and scope of the issues submitted, a discretion reviewable only for abuse. *Loffland Bros. Co. v. Roberts,* 386 F.2d 540, 546 (5th Cir. 1967), *cert. denied,* 389 U.S. 1040, 88 S. Ct. 778, 19 L.Ed.2d 830 (1968). The criteria employed in appellate review of a special verdict are (i) whether, when read as a whole and in conjunction with the general charge, the interrogatories adequately present the contested issues for the jury to consider; (ii) whether the submission of the issues was "fair"; and (iii) whether the "ultimate questions of fact" are clearly submitted. *Dreiling v. General Electric Co.,* 511 F.2d 768, 774 (5th Cir. 1975). Although the trial judge is obliged to submit all material issues raised by the pleadings and the evidence, no issue must be twice submitted through redundant special interrogatories. *Chemetron, supra,* 682 F.2d at 1171; *Angelina Casualty Co. v. Bluitt,* 235 F.2d 764, 770 (5th Cir. 1956). Moreover, there is no requirement that because an issue may be important to the outcome of a case, the jury must be instructed to supply a specific answer informing the court of how they resolved a particular issue. No party is entitled to a special verdict on each of the multi-faceted, multitudinous issues essential to the resolution of a given case. *Miley v. Oppenheimer & Co.,* 637 F.2d 318, 334 (5th Cir. 1981).

Under those criteria, it is apparent that the trial judge correctly submitted the issues to the jury, or at least, any error in the submission does not rise to the level of an abuse of discretion. Petitioner makes much of the trial judge's refusal to submit an interrogatory requested by

Respondent inquiring if the jury believed that LDB represented that it "would not sell or dispose of Brinkcraft, Inc., until the $5.0 million was paid." (App. 80a). At trial, LDB made no objection to the court's refusal to submit this interrogatory and on appeal, made no complaint that its submission would have been the preferred phraseology as compared to the "ongoing and successful" submission (App. 75a). Both LDB and Brinkman made numerous objections to the charge, but at no time did either complain of the court's refusal to submit the interrogatory tendered by Gibraltar either in addition to or in place of special interrogatory 1(b). Petitioner's failure to object precludes its claim of error. *See, Weinar v. Rollform, Inc.*, 744 F.2d 797, 809 (Fed. Cir. 1984); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984). In a civil case, each party must live with the legal theory reflected in the instructions to which it does not object. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985); *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1268 (7th Cir. 1986). Where no objection is made to the instructions given at trial, the substance of those instructions becomes a part of the law of the case. *United States v. Atkinson*, 297 U.S. 157, 159, 56 S. Ct. 391, 392 (1936); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1477 (10th Cir. 1985); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963). In the *Firestone* case, an apparently ambiguous phrase was left undefined in the court's instructions to the jury, leaving them to determine the meaning of the phrase in the context of the facts of the case. The court of appeals held that by returning a verdict for one of the parties, the jury "clearly resolved" the ambiguity in favor of the prevailing party. *Firestone*, 769 F.2d at 1478.

Under Fed. R. Civ. P. 49(a), each party waives the right to a jury trial on any omitted issue unless before the jury commences its deliberations the objecting party demands a proper submission. Obviously, Petitioner cannot benefit from Respondent's proffered interrogatory. Moreover, the same rule grants to the trial judge the power to make a finding on an omitted issue, and where it fails to do so, the trial court is deemed to have made a finding in accord with the judgment on the special verdict. *General Ins. Co. of America v. Fleeger,* 389 F.2d 159, 163 (5th Cir. 1968); *see also, Graphic Products Distributors, Inc. v. ITEK Corp.,* 717 F.2d 1560, 1582 n. 41 (11th Cir. 1983).

It is evident that the omitted interrogatory was cumulative of the other false representations found by the jury. Clearly the Court of Appeals—and apparently the district court—believed that its submission was at best redundant and therefore, unnecessary. As the appeals court observed:

> "While a representation regarding the 'ongoing' nature of subsidiaries which a parent corporation is selling to the subsidiary's officers would not necessarily be false, in the context of this case, these representations were hardly 'ambiguous expressions of opinion' as suggested by LDBrinkman Corp. [footnote omitted].

App. 56a. Rejecting Petitioner's contention that those statements were mere expressions of opinion, the Fifth Circuit properly held that the implication of continued financial backing by the parent company is "as apt a characterization of the questioned remarks as that they were, and were intended to be, personal opinions about future profitability and fiscal health." (App. 57a). Infer-

ences drawn from these facts properly led the jury, the district court, and the Fifth Circuit to conclude that the representations of Petitioner's chief financial officer were not merely non-actionable statements of opinion. *Valdes v. Leisure Resource Group,* 810 F.2d 1345, 1350 (5th Cir. 1987).

The Seventh Amendment permits the jury to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. *Galloway v. United States,* 319 U.S. 372, 396, 63 S. Ct. 1077, 1090 (1943). It is presumed on appellate review of jury instructions that the jury acted in accordance with the instructions given them. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 604, 105 S. Ct. 2847, 2858, 86 L.Ed.2d 467 (1985). It is also presumed that the jury does not consider or base its decision on legal questions with respect to which they are not charged. *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S. Ct. 1571, 1573 (1986). If there is any conflict in the verdict, it is the duty of the courts to attempt to harmonize the answers if such is possible under a fair reading of them. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 364, 82 S. Ct. 780, 786, 7 L.Ed.2d 798 (1962); indeed it is the court's duty to reconcile the jury's findings "by exegesis if necessary" as in *Gallick v. Baltimore & Ohio R.R. Co.,* 372 U.S. 108, 119, 83 S. Ct. 659, 666 (1963); *Arnold v. Panhandle & S.F. R. Co.,* 353 U.S. 360, 77 S. Ct. 840, 1 L.Ed.2d 889 (1957); *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1205 (5th Cir. 1985); *McVey v. Phillips Petroleum Co.,* 288 F.2d 53 (5th Cir. 1961).

While here there was no "inconsistency" between any particular answers in the special verdict, the principles

of reconciliation apply with equal force. The jury clearly found fraud and tortious interference. On even a casual reading of the trial record, it is indisputable that there was sufficient evidence to support either finding. Following the well established mandate to harmonize the verdict where necessary, both the district court and the Fifth Circuit correctly ruled that it was the jury's intention to avoid awarding Gibraltar a "double recovery" for what was undeniably but one loss in the undisputed principal amount of $5.0 million.

Against this framework of the roles of the jury, the trial judge, and the Court of Appeals, the Supreme Court may examine critically Petitioner's claim that the Court of Appeals "found and relied upon facts additional to those found by the jury in response to the interrogatories submitted to it." (Petition, p. 11). The glaring problem with that analysis is that what Petitioner really seeks is for *this* Court to do what it requested of the trial judge in its motion for judgment notwithstanding the verdict and of the Court of Appeals on the appeal: find an insufficiency of the evidence to support the jury's answer finding fraud based on the particular representation that the subsidiary was ongoing and successful in scope. Both courts rejected that suggestion. In a footnote (*see* Petition, p. 12, n.15), Petitioner dismisses the Rule 49(a) problem by arguing that the rejected special interrogatory (App. 80a) was a *distinct* basis for a fraud claim (emphasis by Petitioner). From that premise flows Petitioner's contention that this "separate" claim was not encompassed within the jury's verdict as a matter of logical or legal necessity.

In the first place, in the factual context of this case, while the two questions are not identical, they are cer-

tainly overlapping and redundant to a significant degree. In either instance, the jury was simply asked to determine if the representations made by Petitioner's chief financial officer wrongfully implied to Gibraltar that LDB intended to continue the subsidiary as an ongoing enterprise until the loan was repaid. This is at least as reasonable a construction as that suggested by Petitioner and one which is wholly consistent with the evidence and the jury's intention to find for Respondent.

In the second place, even if the two interrogatories were so divergent as to be wholly unrelated and independent bases for fraud, no error is presented which would warrant remanding this case for a new trial. There was undeniably sufficient evidence to uphold the jury verdict on the interrogatory which the jury did answer favorably to Gibraltar and which was not tainted by the confusion of names present in the other favorably-answered interrogatory. (*See* App. 50a-52a). Petitioner's argument is simply that evidence which would have supported a favorable finding on the unsubmitted interrogatory cannot be viewed as supporting the one which was submitted and answered favorably to Gibraltar. This argument makes no sense and does not warrant Petitioner's conclusion that the appeals court "relied on other statements, introduced in evidence, but never found by the jury, in order to sustain liability." (Petition, p. 12). No additional fact-*finding* process is involved; rather, the Court of Appeals merely examined the evidence to determine its sufficiency to sustain the favorable finding.

In the third place and finally, Petitioner never complained at trial or on the appeal that the instructions were incorrect, that the omitted interrogatory should have been submitted in addition to or in place of one or more

of the fraud questions, and does not here question the sufficiency of the evidence to sustain the favorable finding.

In summary under this point, the word "ongoing" in the factual context of this case had the meaning attributed to it in the first instance by the parties who negotiated the loan and thereafter, by all the participants in the trial. The term simply meant that LDB would maintain the primary guarantor as an ongoing subsidiary until the loan was repaid. If the term was ambiguous, the time to have objected to it was prior to the jury retiring to deliberate its verdict. Fed. R. Civ. P. 49(a) and 51; *Firestone, supra,* 769 F.2d at 1477.

Petitioner claims that the alleged fact-finding process in which the Court of Appeals is supposed to have indulged is "an affront not only to the jury process, but to the authority of the district court." (Petition, p. 15). To the contrary, the only affront to either would be where the Court of Appeals improperly reexamined the verdict to overturn what the properly instructed jury found to be a fraudulent representation and upon which the trial judge properly entered judgment.

B. THE COURT OF APPEALS DID NOT ERR IN REVISING THE DAMAGE AWARD.

In complaining that the Fifth Circuit rewrote the jury's damage award, Petitioner emphasizes the distinction in the respective measures of damage for fraud versus tortious interference and assumes (without justifying) that the two are mutually exclusive. Again, with reference to the facts of this case, it is a distinction without a difference. Either measure of damage produces exactly the same result: Gibraltar loaned $5.0 Million and got back noth-

ing. Following their instructions on the *fraud* theory, the jury could not have returned any verdict less than $5.0 Million plus the approximately $787,000.00 to which Gibraltar testified (without contradiction) was the interest which would have accrued on the note to the date of trial. Under the instructions of *tortious interference*, the jury could have arrived at the same or a lesser figure based on the evidence. But had they chosen to award *separate* damages for the tortious interference, and had the Court entered judgment accordingly, it is obvious that Petitioner would now be complaining that Gibraltar was awarded a "double recovery" for what was undeniably a single loss in the undisputed amount of $5.0 Million.

Regardless of which finding is viewed in support of the judgment, it is clear that Gibraltar's loss from either the fraud or the tortious interference was the amount of money which it was unable to collect due to Petitioner's illegal acts.

Petitioner complains (*see* Petition, pp. 16-17) that Gibraltar failed to prove the value of the guarantees from the individual company officers. Again, Petitioner would have this Court shift the burden of proof on an affirmative defense and require that Gibraltar prove a negative. Wholly apart from the fact Gibraltar was not required to do so, it did produce evidence that the guarantors would have been forced into personal bankruptcy had Gibraltar pressed them for payment. (App. 62a). The Court of Appeals correctly held that Gibraltar is under no legal compulsion to seek payment against all guarantors or any one of them. *United States v. Kohn*, 243 F.Supp. 293, 296 (W.D.S.C., 1965).

Ignoring the error of its assumptions, Petitioner submits the conclusion is "inescapable" that the appeals

court directed a verdict in favor of Gibraltar on a formula which it devised to fit the facts of this case and in a footnote (Petition, p. 17, n.20) suggests the jury might have found no damages under the tortious interference theory by allowing for setoff of any amounts received by Gibraltar in connection with the claim. The absurdity of this suggestion is apparent from the fact Gibraltar never received *anything* from any source other than the assignment of partnership interests made as a part of its settlement with the individual guarantors, Ben Woody and Delbert McDougal. As shown by the Second Amended Final Judgment (App. 81a) the district court has, since the Fifth Circuit's remand, determined that "no amounts have been received from the Woody and McDougal Assignment" (App. 82a). If there were some value received from *any* source, there certainly was no evidence adduced at trial and LDB has yet to demonstrate any payment on the principal balance of the loan from any source whatsoever. Now to suggest to this Court that the appeals court should have speculated that the jury might have been considering non-existent setoffs makes no sense in the factual context of this case. From the evidence, the only plausible inference which the Court of Appeals could have made—consistent with its duty to harmonize any apparent inconsistency in the verdict—was that the jury intended to avoid awarding Gibraltar a double recovery of some or all of a single loss of $5.0 Million. In so doing, the appeals court did not engage in fact finding or directing a verdict, but rather upheld the jury's manifest intent that Gibraltar be restored what it had lost through Petitioner's unlawful conduct.

Even were all of Petitioner's complaints valid, the error is harmless. In remanding the case to the district court

with instructions, the Court of Appeals did not add to the judgment, but rather took away $1.0 Million in damages which it found unsupported by the evidence. This Court has in substance approved the procedure followed in this case. *See Northern Pac. R. Co. v. Herbert,* 116 U.S. 642, 6 S. Ct. 590, 592 (1886); *Hansen v. Boyd,* 161 U.S. 397, 16 S. Ct. 571, 576 (1896) (appellate court in reviewing judgment may permit prevailing party to avoid granting new trial on account of error affecting only a part of the judgment by entering remittitur as to the erroneous part where the court can clearly distinguish it). The Fifth Circuit's instructions to the district court were simply to revise the judgment to conform to the uncontested evidence in a manner consistent with the jury verdict that fraud and tortious interference were committed. The procedure which the Fifth Circuit followed in this case is not unprecedented or such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *See e.g. Dixon v. International Harvester Co.,* 754 F.2d 573, 590 (5th Cir. 1985); *Harper v. Zapata Off-Shore Co.,* 741 F.2d 87, 93 (5th Cir. 1984); *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033, 1046-47 (5th Cir. 1970); *Carlton v. H.C. Price Co.,* 640 F.2d 573, 582 (5th Cir. 1981).

In the Fifth Circuit, the well established rule is that the Court of Appeals is obliged to reduce the verdict to the maximum amount which the jury could properly have awarded. *Stapleton v. Kawasaki Heavy Industries, Ltd.,* 608 F.2d 571, 574 n.7 (5th Cir. 1979), *modified on other grounds,* 612 F.2d 905 (5th Cir. 1980); *Dixon v. International Harvester Co., supra,* 754 F.2d at 590. While admittedly the term "remittitur" does not expressly

appear in the Court of Appeals' opinion, the practical result is the same. The function of remittitur is to correct the injustice of an excessive verdict without the necessity of a new trial. *Glazer v. Glazer,* 278 F.Supp. 476, 482 (E.D. La. 1968) (function of remittitur is to take place of new trial when jury has arrived at verdict that would allow court to order new trial). In taking away from Gibraltar a portion of its damages as awarded by the jury, the Court of Appeals has not injured Petitioner and logically, only Respondent could have ground to complain. In accepting the judgment of the Court of Appeals, Gibraltar effectively accepts the correctness of the finding that its damages were $5.0 million and not the greater sum the jury awarded. In this respect, the case is unlike the procedure condemned in *Dimick v. Schiedt,* 293 U.S. 474, 55 S. Ct. 296, 301 (1935) where the district court effectively created an *additttitur* which this Court found to contravene the Seventh Amendment.

Since the *principal* amount of the damages was uncontroverted, the subtraction of *any* amount of interest and the instruction to recalculate the interest in a manner consistent with Texas law was a ministerial function which the court could perform as a matter of law—no fact finding process is involved. *Shingleton v. Armor Velvet Corp.,* 621 F.2d 180 (5th Cir. 1980) (appeals court order of remittitur where jury's error in awarding damages was obvious and correction merely mechanical); *Budge v. Post,* 643 F.2d 372 (5th Cir. 1981); *Carlton v. H.C. Price Co.,* 640 F.2d 573 (5th Cir. 1981) (court of appeals' right to fix remittitur is same as that of trial court). How the reduction of the judgment could harm LDB is beyond rational comprehension. The only basis on which LDB's complaint can be justified is under the

premise that it wants to reexamine the verdict and gain a new trial before a jury hopefully more favorable to its position. If there is error in the manner in which the Court of Appeals remanded the case for redetermination of the interest applicable to the principal amount of the judgment, the error is not one of constitutional dimension nor even one which predicts "future episodic violations of the right to trial by jury." (*See* Petition p. 19).

CONCLUSION

Petitioner implicitly concedes that no ground exists for review on writ of certiorari in this case under S. Ct. R. 17 except for its assertion that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision. To support that conclusion, Petitioner has to ignore logic, the facts of the case and well established judicial precedent. It is not unreasonable to conclude that Petitioner's complaint is not so much with the judgment or the evidence which supports it but rather the method by which the Court of Appeals arrived at its conclusion upholding the jury verdict. As observed earlier, had the Court of Appeals arrived at the same judgment without an opinion, it is difficult to discern anything about which Petitioner could complain.

Respondent believes it significant that Petitioner makes no claim regarding the sufficiency of the evidence to sustain the verdict or the manner in which the jury was instructed, but alleges only that the appellate court arrived at its decision through an unprecedented "fact finding process" which destroyed the jury's verdict. Had there been an addittitur (instead of effectively, a remittitur) the complaint might have validity. As it stands, the contention is an exercise in sophistry.

In the final analysis, it is the Petitioner who would have this court re-examine the jury verdict and through a complex analysis not warranted by the evidence and the unchallenged jury instructions, destroy the verdict in contravention of the Seventh Amendment which Petitioner claims so boldly was violated. There are no grounds for granting a writ of certiorari in this case and the petition should be denied.

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